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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85144490
Applicant	VCNA Prestige Material Holdings, Inc.
Applied for Mark	PRESTIGE CONCRETE PRODUCTS
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Date	08/24/2012

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

SERIAL NO.: 85/144490
FILING DATE: October 4, 2010
MARK: PRESTIGE CONCRETE PRODUCTS
APPLICANT: VCNA Prestige Material Holdings, Inc.
LAW OFFICE: 109
EXAMINING ATTORNEY: William M. Rossman

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

TABLE OF AUTHORITIES

Cases

<i>Broyhill Furniture Industries, Inc.</i> , 60 USPQ2d 1511, 1513 n.3 (TTAB 2001)	3
<i>1st USA Realty Professionals, Inc.</i> , 84 USPQ2d 1581 (TTAB 2007)	3

Other Authorities

TMEP 710.01(c)	3
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APPLICANT'S REPLY BRIEF

I. Introduction

Applicant VCNA Prestige Material Holdings, Inc. ("Applicant") has appealed to the Trademark Trial and Appeal Board from the final decision of the United States Patent and Trademark Office refusing registration of the above-referenced mark. Applicant filed its appeal brief on June 18, 2012, and the Examining Attorney filed his appeal brief on August 6, 2012. One of the issues raised by the Examining Attorney in his appeal brief is an objection to certain evidence submitted by the Applicant. Applicant submits this reply brief to argue that the Examining Attorney has waived his right to object to this evidence.

II. Argument

The specific objection made by the Examining Attorney in his appeal brief is:

"Applicant first argues that just because the goods are made of concrete does not necessary (sic) mean the goods are related. Applicant contends that the use of the cited mark is architectural in nature while the use of applicant's mark is structural. However, applicant has only provided minimal evidence that there is any difference in the channels of trade or that the goods are not similar or related. The applicant has submitted a link from the registrant's web site (actual website was attached by the examining attorney and not by the applicant) indicating the registrant's Prestige Series units are "often used for accents or banding". The examining attorney objects to this evidence because applicant did not submit attached copies of the website and the examining attorney is unable to open the link in a variety of web browsers to view the evidence."

The Examining Attorney is referring to evidence submitted by the Applicant in its July 20, 2011 response to an Office Action, where the Applicant quoted from the website of County Materials Corporations, the Registrant of the cited mark ("Registrant"), but did not attach printouts of the website. This website's URL address is <http://www.countymaterials.com/products/concrete-thin-veneers/item/premier-glazed-units>, and the quote was that the glazed

concrete masonry units identified by the cited mark are “often used for brightly colored accents or banding, and for full walls in gymnasiums, restrooms and indoor swimming pools where the stain and moisture resistant finish reduces maintenance” and that “[k]itchens and laboratories also benefit from the chemical and bacteria-resistant surface.”

The Examining Attorney failed to object to this evidence in the next Office Action dated August 11, 2011 (although he objected to other evidence pertaining to third-party registrations). He also failed to object to this evidence in the September 23, 2011 Office Action and, instead, commented on the evidence by stating:

“The examining attorney believes applicant has been very selective with the evidence submitted from applicant’s website. The applicant’s goods/services, namely, “Concrete” are almost identical to registrant’s goods/services, namely, “Architectural masonry units, namely, glazed concrete blocks used for interior walls”. The registrant’s website (as part of this file in applicant’s response) shows that they also produce masonry in the form of concrete and also manufacture load-bearing block so applicants’ argument concerning the load bearing walls and interior walls is simply not the case. ...”

A check of the URL address of the website, <http://www.countymaterials.com/products/concrete-thin-veneers/item/premier-glazed-units>, shows that it is no longer operational. Applicant submits that the evidence is still posted on Registrant’s website but on another webpage, namely <http://www.countymaterials.com/products/masonry/item/premier-glazed-units> (see August 24, 2012 printouts from this webpage attached as Attachment 1).

In addition, the Examining Attorney’s argument that Registrant produces load bearing block is misplaced. The goods identified by Registrant’s mark are the architectural masonry units used for brightly colored accents or banding. The mark is not used by Registrant for any of its other goods/services.

It is well established that, if an Applicant submits improper evidence of third-party registrations, the Examining Attorney must object to the evidence in the next Office Action, or the Trademark Trial and Appeal Board (“Board”) may consider the objection to be waived. TMEP 710.03; *see In re 1st USA Realty Professionals, Inc.*, 84 USPQ2d 1581 (TTAB 2007) (Board considered Applicant’s own registration, provided for the first time on appeal, because it had been referred to during prosecution and the Examining Attorney addressed the issue without objection; Board also allowed evidence of a list of third-party registrations because the Examining Attorney did not advise Applicant of the insufficiency of the list while there was still time to correct the mistake); *In re Broyhill Furniture Industries, Inc.*, 60 USPQ2d 1511, 1513 n.3 (TTAB 2001) (objection to evidence waived where it was not interposed in response to Applicant’s reliance on listing of third-party registrations in response to initial Office Action). Furthermore, in discussing the need for the record in any application to be complete prior to appeal, TMEP 710.01(c) states: “Whenever an examining attorney objects to evidence submitted by an applicant, the objection should be raised as soon as possible and continued in the examining attorney’s brief, or the Board may consider the objection to be waived. *In re Broyhill Furniture Industries, Inc.*, 60 USPQ2d 1511, 1513 n.3 (TTAB 2001).”

Applying those principles to this case shows that the Examining Attorney did not object to the evidence presented by the Applicant but, instead, commented on the evidence from Registrant’s website and indicated Registrant’s website was part of the file, thereby leading the Applicant to believe the evidence was part of the record. If Applicant had been made aware in a timely fashion of the Examining Attorney’s objection, Applicant could have submitted printouts of the website while there was still time in the examination process and while the relevant webpage was still operational.

The Examining Attorney's failure to timely object to the evidence should result in a finding that he has waived that objection.

III. Conclusion

For the foregoing reasons, Applicant submits that the Examining Attorney waived any objection to the evidence from Registrant's website that was presented by Applicant during the examination process.

Respectfully submitted,

VCNA Prestige Material Holdings, Inc.

By: /angela alvarez sujetk/

Name: Angela Alvarez Sujek
Susan M. Kornfield
Karen H. Anderson

Title: Attorneys for VCNA Prestige Material Holdings, Inc.

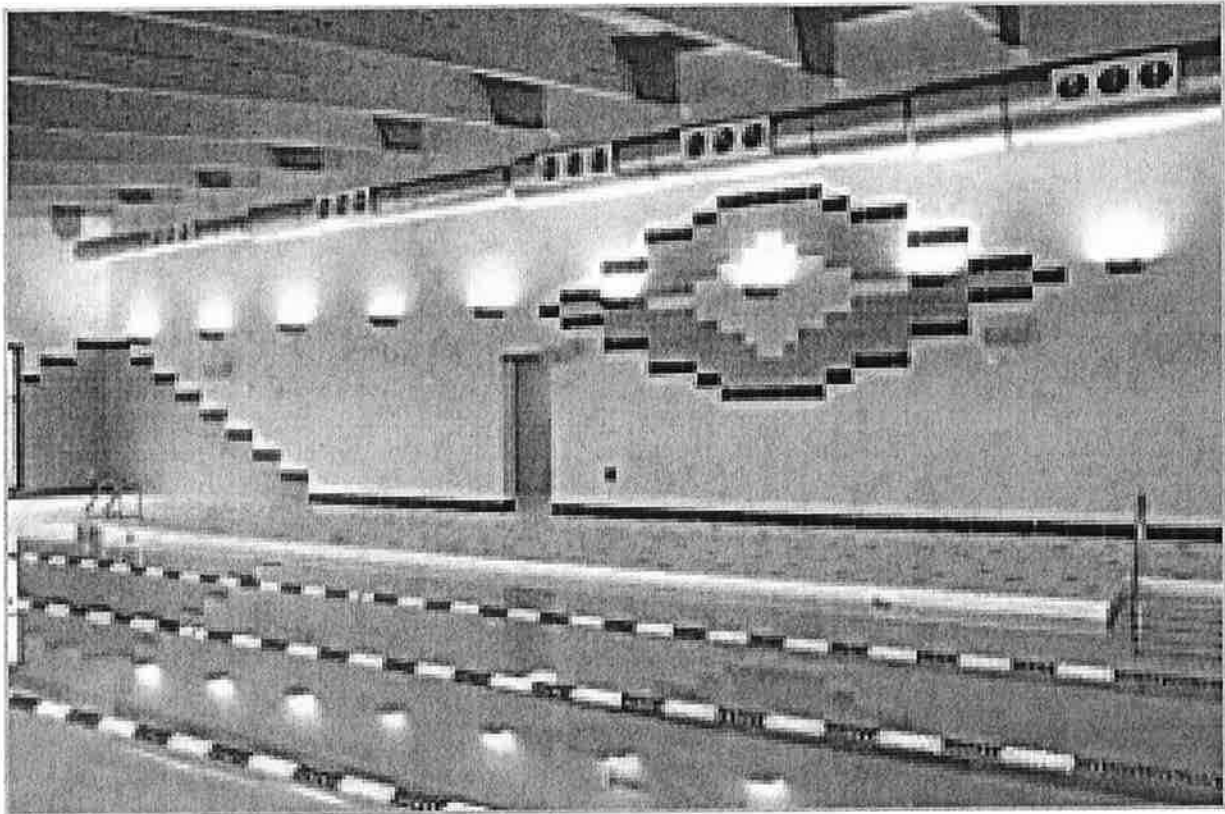
Address: Bodman PLC
201 S. Division St., Suite 400
Ann Arbor, Michigan 48104

Phone: 734-761-3780

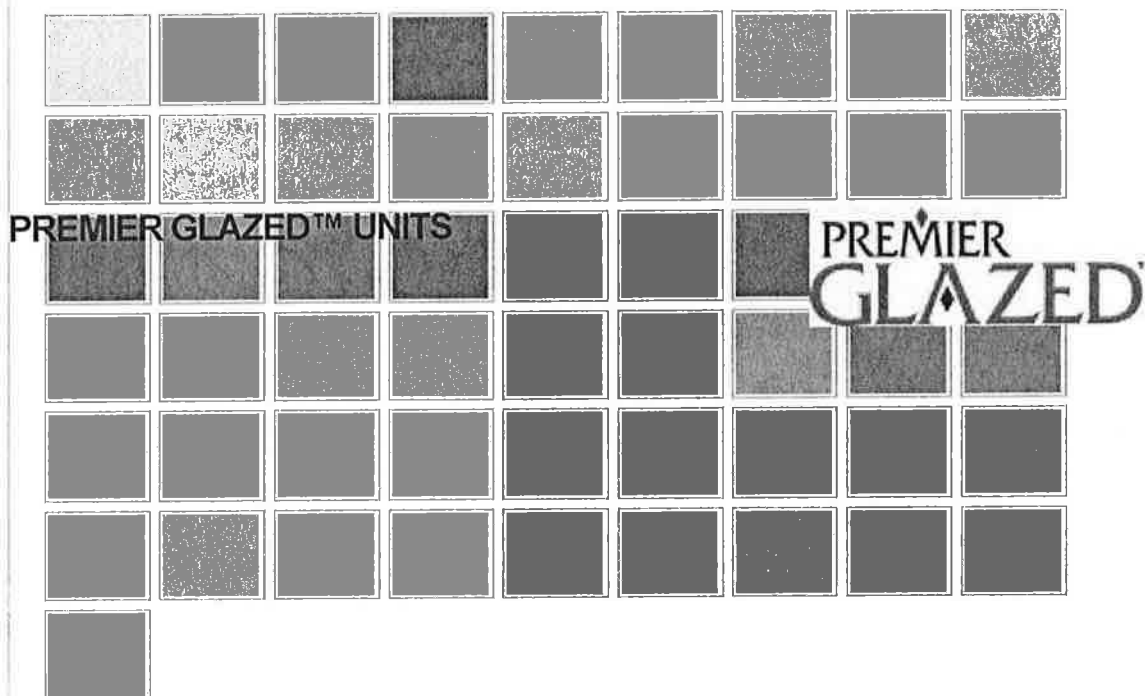
Dated: August 24, 2012

Attachment 1

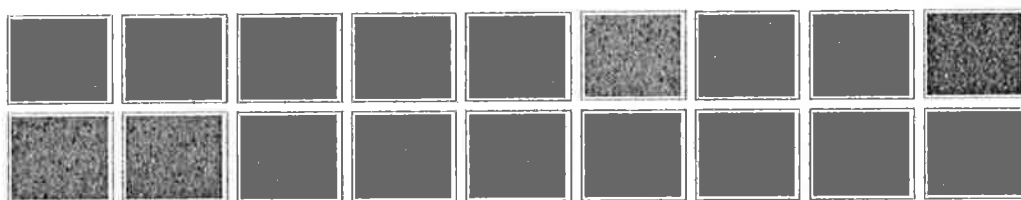
Menu



Premier Glazed



Premier Prestige Series



REQUEST FOR SAMPLES

Fill out this form

to receive information and samples of Premier Glazed & Premier Prestige Series masonry for your upcoming projects.

DOWNLOADS:

Premier Glazed Prestige Brochure

Premier Glazed And Prestige Shapes And Sizes

Combine inherent beauty with unmatched quality and lasting durability. Glazed concrete masonry units are manufactured by **bonding a permanent colored facing to a lightweight concrete masonry unit**, providing a smooth impervious surface with superior resistance to natural and man-made elements.

Premier Glazed™ and **Premier Prestige Series®** units are available in a variety of vibrant colors, pastels and earth tones. Premier Prestige Series blend coarse aggregate textures with rich color hues - taking on characteristics of earth tones commonly found in

nature. Their variety of sizes, scales and patterns provide unlimited design opportunities for both indoor and exterior applications.

- Outstanding colorfastness
- Rich color hues
- Superior resistance to fading, cracking and crazing
- Dimensional uniformity
- Optional scoring available
- Custom engraving available

Premier Glazed and Premier Prestige Series units are often used for brightly colored accents or banding, and for full walls in gymnasiums, restrooms and indoor swimming pools where the **stain and moisture resistant finish reduces maintenance**.

Kitchens and laboratories also benefit from the chemical and bacteria-resistant surface. The glazed surface is waterproof, resistant to staining and graffiti, highly impact resistant, as well as being resistant to many chemicals and bacteria.

Special admixtures and mortars are available for use with glazed units that provide better stain, bacteria, and water penetration resistance.

Premier Glazed and Premier Prestige Series are also available in Thin Veneers.

RELATED PRODUCTS

Oversized Units

Splitface Units

Premier Ultra® Burnished / Ground Face
Units

Tilt Up & Precast Concrete Thin Veneers

Field Applied Concrete Thin Veneers

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